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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 532

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, By JOSEPH E. McLEAN,
Commissioner of Conservation and Economic Development,

Appellee.

PETITION FOR REHEARING

VITO F. LANZA,
Attorney and Counsel for Appellant
Silvio A. Lanza.

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Appellee.

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Silvio A. Lanza, the above-named appellant, hereby respectfully applies, pursuant to Rule 58, subd. 1, of the Rules of this Court, for a rehearing of the above-named appellee's motion to dismiss the appellant's appeal heretofore taken as of right to this Court.

The Prior Proceedings

On or about September 22, 1958 the appellant took an appeal as of right to this Court from the judgment of the Supreme Court of New Jersey. The judgment of the Supreme Court of New Jersey had affirmed a judgment of the Superior Court of New Jersey, Law Division, filed

December 2, 1957, which, in an action to condemn appellant's property situated in Round Valley, State of New Jersey, adjudged that the appellee was entitled to the relief demanded in the complaint herein and appointed commissioners of appraisal.

The Decision of This Court

On or about January 26th, 1959, this Court handed down the following decision upon the appellee's motion to dismiss the appeal or to affirm the judgment appealed from, namely:

> "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

Statement of Facts Relating to This Application for Rehearing

In appellant's Statement as to Jurisdiction, at pages 8-9 thereof, he showed to this Court that, after the commissioners of appraisal had been appointed pursuant to the judgment herein appealed from, a wholly inadequate condemnation award was made to appellant who thereupon took steps to review that award. A trial on that issue was begun before the Superior Court of New Jersey while the appellant's appeal to this Court was still pending. Meanwhile, the appellee paid into Court the sum awarded by the commissioners of appraisal but has not yet taken possession of the property in question.

The trial before the Superior Court is still in progress: More than a month of actual days in court have already been consumed and the appellee has not yet finished putting in its defense to the affirmative case made out by the appellant herein. A considerable amount of additional days in court will be necessary to finish the trial before the Superior Court.

At the start of this trial before the Superior Court, appellant raised again, on the record, all the questions presented to this Court by his notice of appeal herein. Thus, at the opening of the hearing in the Superior Court, the appellant, by appropriate motions to dismiss the action herein, raised the following federal questions; namely:

Whether the Round Valley Act is repugnant to the due process and equal protection clauses of the 14th Amendment?

Whether the New Jersey Legislature, in enacting the Round Valley Act, created a "debt" or "liability" of the State in contravention of the due process and equal protection clauses of the 14th Amendment?

Whether the Round Valley Act involves an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development and is therefore repugnant to the due process and equal protection clauses of the 14th Amendment?

Whether the Round Valley Act is repugnant to the due process and equal protection clauses of the 14th Amendment in that it fails to provide appellant and other interested parties due notice and an opportunity to be heard?

Whether the judgment of the Supreme Court of New Jersey, herein appealed from, is in contravention of the due process and equal protection clauses of the 14th Amendment?

Whether the aforesaid judgment of the Supreme Court of New Jersey is in contravention of the said clauses of the 14th Amendment on the ground that the Round Valley Act has expired according to its terms?

Whether the courts below had erred, in contravention of the due process and equal protection clauses of the 14th Amendment, in precluding the appellant from

demonstrating that the Commissioner had delegated to others powers attempted to be conferred to him by the Round Valley Act?

Whether the New Jersey Legislature appropriated funds in violation of the due process and equal protection clauses of the 14th Amendment since it does not appear that the Governor of New Jersey had certified that there were sufficient funds on hand or anticipated for this improvement?

Whether the employment by the appellee of Special Counsel was repugnant to the due process and equal protection clauses of the 14th Amendment?

Whether Joseph E. McLean, the past incumbent of the office of Commissioner of Conservation and Economic Development, is the official authorized to conduct the present proceeding?

The trial judge overruled all the foregoing contentions except the last one; as to that, he granted the appellee leave to substitute the present incumbent of the office of Commissioner.

All of the foregoing issues are the very same issues presented by this appeal and have been reserved by appellant upon the hearing before the Superior Court of New Jersey.

The Basis of This Application for a Rehearing

An application for a rehearing will be entertained where there are intervening circumstances of substantial or controlling effect.

> *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 34, footnote 1;
> *Massey* v. *United States,* 291 U. S. 608.

Secondly, substantial grounds, not previously presented, justify an appeal as of right to this Court.

See:

Schriber-Schroth Co. v. *Cleveland Trust Co.*, 305 U. S. 47, 50.

POINT I

The motion for rehearing should be granted and the appeal held until the determination of the proceedings before the Superior Court of New Jersey.

As above pointed out, all the questions presented by this appeal have been raised again on the record at the trial before the Superior Court of New Jersey. That trial, which has already consumed more than a month of actual days on trial, is still in progress, the trial having started after the appellant had taken his appeal as of right to this Court. It would be in the interests of justice if this Court should hold the appeal as of right herein pending the determination of the proceedings in the New Jersey Superior Court, since appellant has reserved the right to review these questions upon another appeal to this Court from the final judgment fixing the condemnation award herein.

It is respectfully submitted that the aforesaid matters have developed since the appeal as of right was originally taken and constitute intervening circumstances of substantial and controlling effect within the meaning of the rules of this Court.

POINT II

A substantial ground of appeal is available to appellant, although not previously presented.

In his statement as to jurisdiction, appellant did not adequately present a ground available to him, namely, that the taking herein complained of was not for a public use. The undisputed fact is that the Commissioner has acquired much more land than can be used for reservoir purposes under an outstanding decree of the United States Supreme Court. In this connection, the trial court judge pointed out that, under the aforesaid decree, New Jersey may take only 100 million gallons of Delaware River water per day for out-of-basin uses and that existing commitments reduce the amount available for any reservoir system at Round Valley to a figure which would permit only a much smaller reservoir. (See opinion at pp. 42-43 of Jurisdiction Statement.) Consequently a substantial question is presented herein as to whether appellant's lands have been taken for a public use.

See:

Bragg v. *Weaver*, 251 U. S. 577.

CONCLUSION

The motion for a rehearing should be granted and, upon rehearing appellee's motion to dismiss should be denied.

Respectfully submitted,

.....

VITO F. LANZA,
Attorney and Counsel for
Appellant Silvio A. Lanza.

THOMAS GRIMES, Esq.,
on the Brief.

Certificate of Counsel

This is to certify that the foregoing petition for rehearing on the grounds therein mentioned, is presented in good faith and not for delay.

Dated, February 10, 1959.

.....

VITO F. LANZA,
Counsel for Appellant.